No. 15429

United States
COURT OF APPEALS
for the Ninth Circuit

H. P. WILLMAN, Doing Business as POPPERS SUPPLY CO.,

Appellant,

vs.

HAROLD M. ALVER, OSCAR J. ALVER, RAYMOND N. ALVER, LUCILE M. ALVER, JEANNETTE B. ALVER and MILDRED M. ALVER, a Co-partnership Doing Business as Premier Popcorn Company,

Appellees.

APPELLANT'S BRIEF

Appeal from Final Judgment of the United States District Court for the District of Oregon.

HON. CLAUDE McCOLLOCH, Judge.

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JURISDICTION

Jurisdiction of the action in the District Court properly attached because the pre-trial order in paragraph 3, under agreed facts (R. 8), sets forth the diversity of citizenship and amount in controversy under 28 U.S.C.A. Section 1332.

Final judgment in the case was filed December 10, 1956 (R. 29). Notice of Appeal was filed January 3, 1957 (R. 31), and a supersedeas bond filed on January 4, 1957 (R. 32). The appeal has been taken in time under Federal Rules Civil Procedure, rule 73, 28 U.S. C.A. This Court has jurisdiction of the appeal under 28 U.S.C.A. Section 1291.

STATEMENT OF THE CASE

This is an action for damages for an alleged breach of a sales contract, involving the sale of corn which was to have been shipped in monthly installments. The action was brought by the Premier Popcorn Company, the seller, located in Watseka, Illinois, against H. P. Willman, doing business as Poppers Supply Co., Portland, Oregon, the buyer. The Premier Company is a processor of corn, purchasing it from the farmers and selling it to wholesale distributors. The Poppers Supply Co. is a wholesale distributor. A verdict was directed for the plaintiff Premier Company, the seller, and the defendant buyer appeals.

The appellant had been buying corn for some time from the appellee (R. 72). On May 11, 1953, the parties entered into a written contract for 7200/100 lb. bags of corn at the price of $9,00 a bag, F.O.B. Watseka, Illinois, including bags (Ex. 1). The contract called for shipments of 600 bags per month, beginning October, 1953, and extending for a period of twelve months. The quantity was subsequently reduced by mutual agreement to 3600 bags, or six cars of corn. The last six cars were can-

celled. There is no dispute about the reduction in quantity (Exs. 2 and 4).

On or about October 12, 13 or 14, 1953, the appellant buyer was in Chicago and talked with the appellee seller about the corn market generally (R. 39-40). The buyer told the seller that the corn market was going down and asked for some relief on the contract price (R. 63). The seller said he would talk to his partners about it (R. 40).

On October 23rd, the seller in Watseka, Illinois, telephoned the buyer in Portland, Oregon. According to the testimony of the buyer, the seller agreed to reduce the price of the corn from $9.00 to $8.00 a bag (R. 63), with the proviso that if the market went up again, the contract price would be followed.

On that same day, October 23rd, the seller wrote the buyer a letter (Ex. 3) in which the seller stated:

> "As to the contract dated May 11, 1953, we will hold this contract in abeyance and ship you popcorn for the time being at a price of $8.00 per hundred weight, including the bag F.O.B. our plant."

The buyer, upon receipt of this letter, understood it to be a confirmation of his understanding of the telephone conversation (R. 64). The seller now claims that neither the telephone conversation nor his letter of October 23rd were a reduction in the contract price. The seller now maintains that he meant that he would sell the buyer what the seller refers to as "open market" corn for the $8.00 price (R. 41-42).

In November, 1953, the seller came to Portland and reduction in price was discussed again (R. 65). The

seller now contends that this conversation dealt only with an $8.00 price on so-called "open market" corn (R. 43). The buyer and his salesman were both at the meeting and testified that the seller again confirmed the $8.00 contract price (R. 66 and R. 77). Neither the buyer nor his salesman heard the words "abeyance" or "open market corn" mentioned in this conversation (R. 65, 67, 77).

By letter of December 15, 1953 (Ex. 4), the buyer notified the seller that he was exercising his right to cancel six cars in accordance with the seller's letter of May 20, 1953 (Ex. 2). On December 22, 1953, the seller wrote the buyer a letter (Ex. 5), stating that the contract of May 11, 1953, could no longer be held in abeyance, and asked for shipping instructions for the October, November and December shipments, and enclosed an invoice for three cars of corn at $9.00 F.O.B. Watseka, Illinois, the original contract price. This letter was received by the buyer on January 4, 1954 (R. 10). The buyer phoned the seller on January 5, 1954, and questioned him about the invoice and the price on it (R. 68). The buyer testified that the seller said that he was going back to the original contract price of $9.00 (R. 68). On that same day, January 5, 1954, the buyer sent a purchase order (Ex. 7) to the seller, giving shipping instructions for two cars of corn at $9.50 F.O.B. Portland which is $8.00 F.O.B. Watseka ,Illinois (R. 47). No corn was shipped on this purchase order

On February 2, 1954, the buyer sent a purchase order to the seller (Ex. 11), for the entire six cars of corn at $8.00 F.O.B. Watseka, Illinois but there was no response to this purchase order and no corn was ever shipped.

On February 11, 1954, the buyer telegraphed the seller (Ex. 12), notifying the seller that the buyer was completely out of corn and must know by return wire if corn was being shipped under the buyer's purchase order of February 2, 1954. There was no response to this wire.

The seller filed suit, claiming breach of contract by the buyer in failing to order the corn at the original contract price.

Trial was had before a jury, and, after motion by the plaintiff for a directed verdict (R. 85), the Court directed the jury (R. 90 et seq.) to find a verdict for the plaintiff and to assess the damages. The jury determined the damages to be $10,800 for which sum judgment (R. 29) was entered and the buyer appeals. The jury apparently found the damages to be $3.00 per bag on 3600 bags, or the difference between the contract price of $9.00 and a market price of $6.00, which was the seller's testimony as to market price in February, 1954 (R. 52).

STATEMENT OF APPELLANT'S SPECIFICATION OF ERRORS

(1) That the District Court erred in directing a verdict for the appellee, and in finding, as a matter of law, that the contract between the appellee and appellant had neither been modified nor rescinded when the evidence in its most favorable light to the appellant, demonstrated that the question of whether or not the contract had been modified or rescinded was a question of

fact for the jury; and the Court erred in failing to give the instructions requested regarding modification or rescission.

At the close of the testimony, counsel for appellee moved for a directed verdict as follows (R. 85):

> "I move the Court to instruct the jury that the defendant has not established a defense that the contract was modified by subsequent agreement as to price on the ground that such an agreement would be in violation of the statute of frauds and that there was no considerations supporting any such agreement and, therefore, as a matter of law the defendant has not established that defense."

The Court, after hearing arguments on this motion and a motion for dismissal by the appellant's counsel's made the following statement (R. 88):

> "The Court: This case has had a hectic career. I don't imagine what I am going to say is going to be satisfactory. I know it isn't all around. It isn't the kind of case that I enjoy, because the result, it seems to me, that is impelled by the record is really not equitable. The law of sales in the commercial world has never really been equitable.
>
> "After reflection overnight, taking these papers home with me and reading them both last night and this morning, I don't see anything much to submit to this jury. I can't follow you gentlemen on your claim that there is a rescission, a question of rescission to be submitted to the jury. That is not your testimony. Your testimony is that the contract was modified, not rescinded. Your client's two orders there at the end, when he was taking his position—and these people, no doubt under a lawyer's advice at the time, were squaring off to take the position—the last two orders are definitely related to the contract, and they purport to be under the contract of

May, 1953. So very clearly it seems to me that what you were saying at that time was that you recognized that the contract was still in existence but it had been modified as to price and you were ordering under the contract but at a lower price.

"That is where you get into legal difficulties, it seems to me, because you have to rely upon an oral modification of the contarct except as you claim something for that letter with the word "abeyance" in it. That is the only writing that you can claim supports your modification theory. I just don't read that letter the way you claim for it.

"So in my view of the case the plaintiff is entitled to a directed verdict, with only one question for the jury and that is the amount of damages, to whatever extent you differ there."

The Court then instructed the jury, in part, as follows (R. 94):

"Now you will have one form of verdict: 'We, the jury in the above-entitled matter, find our verdict for the plaintiffs in the sum of blank dollars.' "

The appellant requested the following instruction, which was not given (R. 25):

"A written contract may be rescinded and superseded by a new contract by the express or implied agreement of the parties, and, likewise, a written contract may be modified by subsequent agreement of the parties.

"This rescission or modification may be oral or partly oral and partly written, even though the original contract be in writing. Therefore if you find that the plaintiffs' letter of October 23, 1953, and the oral conversations of the parties, either taken separately or considered together, amounted to a rescission of the original contract and the making of a new contract at a price of $8.00, or a modification

of the old contract so that the price was changed to $8.00, then you must find your verdict against the plaintiffs and for the defendant, for it is uncontradicted that defendant offered to buy corn at $8.00."

The appellant took exception to the direction of verdict and to the failure of the Court to give the requested instruction (R. 95):

"Mr. Reynolds: The defendant objects to the direction that the jury find a verdict for the plaintiffs, and then objects to the failure of the Court to give the instructions submitted."

The Court overruled the exceptions, stating as follows (R. 96):

"The Court: The exceptions have been considered and respectively overruled."

(2) That the District Court erred in failing to direct the jury that it should give due consideration to mitigation of damages, and in failing to give the appellant's requested instructions concerning mitigation of damages. The appellant requested the following instructions requesting mitigation of damages (R. 27, 28):

"The law imposes upon a party injured by another's breach of contract the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. Therefore, if you find that the defendant made a bona fide offer to buy corn at $8.00 per bag, then that may be taken into your consideration in assessing damages, if you find that plaintiff is entitled to any damages. Thus if you find that defendant was required to accept 1800 bags, or 3 monthly installments, under the contract, plaintiff's damages would be limited to $1.00 per bag, or $1800.00. If you find that defendant was required to accept 3600 bags,

then the damages, under this theory, would amount to $3600.00."

and

"If you find that the original contract was neither modified nor rescinded, then you must consider the quantity of corn which the defendant was required to accept under the original contract. The words 'in abeyance' as used in plaintiffs' letter of October 23, 1953, mean: 'Temporarily inactive, suspended or suppressed; temporarily without manifest existence' or 'a condition of being undetermined.' Since the plaintiff's letter terminating the period of abeyance did not reach defendant until the time for performance had passed as to the first three months, you must limit your consideration of damages to the last 3 cars, or 1,800 bags of corn."

The basis for the foregoing instructions was set forth in the trial memorandum submitted by the appellant's counsel to the Court.

The Court's charge respecting damages (R. 90 et seq.), which is set forth in totidem verbis in paragraph (3) below, makes no reference to mitigation of damages in any respect.

The appellant took exception to the failure of the Court to give the instructions requested (R. 95):

"Mr. Reynolds: The defendant objects to the direction that the jury find a verdict for the plaintiffs, and then objects to the failure of the Court to give the instructions submitted."

The Court overruled the exceptions stating as follows (R. 96):

"The Court: The exceptions have been considered and respectively overruled."

(3) That the District Court erred in failing to direct the jury to find damages based upon the market price at the time and place of delivery, and in directing the jury that damages be based upon the market price in either January or February, 1954, when the contract was for deliveries in installments beginning in October, 1953, and in failing to give the defendant's requested instructions concerning this aspect of the case; and further that the verdict is contrary to the law of damages.

The appellant requested the following instructions (R. 26, 28):

> "With respect to a contract for future delivery of merchandise, the rule of general damages is that on refusal of the buyer to take the property, the seller is entitled to recover the difference between the contract price and the lesser market value of the goods at the time and place of delivery. Therefore if you find that the original contract was neither rescinded nor modified, and that the defendant breached the contract, then the maximum amount which plaintiff would be able to recover would be the difference between the contract price of $9.00 per hundred pound bag and the market price during October, November and December, 1953, and January, February, and March, 1954, computed on 600 bags for each of those months, except however, that plaintiff was required to mitigate his damages, as stated in other instructions."

and

> "If you find that the original contract was neither modified nor rescinded, and if you do not limit plaintiffs' damages to $1.00 per bag, then you must consider the measure of damages based on market value, and since the market price was falling, it will make a difference as to what months you use. In this connection I instruct you that when

plaintiff notified defendant that the contract could no longer remain in abeyance, the legal effect of this was to place the parties back in their original position, and you should start with the market price in October, 1953, and use the market price for each succeeding month to compute the damages as to each 600-bag car."

The Court's charge respecting damages is as follows (R. 90 et seq.):

"The Court: Ladies and Gentlemen, the plaintiffs' theory about the damage here is that in the month of January the parties came to the end of this transaction in the sense that at that time—that is one possibility, according to the plaintiffs' way of looking at it—the buyer the man down here at the end of the table, made it definitely plain that he was not going to go ahead with the deal, so that the damages should be calculated as of that time and the damages would be the difference between the contract price which was $9.00 per 100 pounds and what the then market price was. The parties differ as to what the market price was. The plaintiff says it was then $6.50; that it had fallen to $6.50 per hundred pounds, whereas, as you see over there, the defendant say it had not fallen that much at that time; that it had only fallen to $7.25. So if that is the method in which the damages should be figured, the damages would come out differently on account of the difference between the parties as to what the then market was.

"Those are the first two figures that I suggest you write down. If you take the $6.50 market figure, which is the plaintiff's idea, as of that month the damages would be $9,000, if that is the method to use, whereas if you take the defendant's idea of the market, which is a good deal higher, or $7.25, the damages would be less. They would be $6,300.

"That is one of the things you may have to resolve in the case. Now, then, if February is the

month to take, if that is the month when in fact the parties came to the end of their transaction, by a definite rejection by the buyer of the contract, you have two figures again to deal with because of the difference between the parties as to what the market price then was. As you see on the board, the plaintiffs' idea was that the market had fallen to $6.00, or $3.00 less than the contract price. And since the amount in dispute was 3,600 bags, that is one thing we can figure out. Three times 3,600 bags would be $10,800. That would be the damages if that was the month you took and if that was the market price you took.

"The defendant again thinks that the market was higher in that month than the plaintiff does. His idea was it was $6.75, as you see. So that is going to make the damages less in that month if that is the month you take, and that figure comes out, so the gentlemen have told me, to $8,100 rather than $10,800.

"If you accept the line of reasoning that the attorney for the defendant has presented to you, as he has shown you down there at the foot of the board, the damages are $6,000, and we get still another figure. In fact, he says they should be reduced by the number of bags involved at the price per bag, coming to $900.00, which drops it to $5,-100.

"So you have six possible choices. And the gentleman for the plaintiff who was just speaking took a different view about the bags, so that would make a $7.00 figure.

"I don't know whether I am making this very plain to you. It is pretty mixed up, but that is the way these commercial transactions get sometimes.

"In the few brief remarks I am going to make I am going to start with the line of reasoning that Mr. Stirling, representing the defendant, presented to you: That the damages should be figured on each

month, beginning back in October when the first delivery was to be taken. His theory comes out pretty plainly when you look at those two figures up there. He says that there was no damage in that month because, according to his figure over there, the market was still the $9.00 contract price. And he says that that was the month that this man had agreed to take the corn, and he didn't take it, so the damages should be computed as of that time for that monthly quota, and so on clear through.

"I am not going to say that you have to reject that theory altogether, but I am just going to make this comment, which I feel privileged to do. I think that disregards what the parties were doing. You will find a letter in here written in October where the seller is telling the buyer that he will hold the contract in abeyance. There are some differences here about what 'abeyance' means. That just shows you better use a simple word when you can and sometimes you come out better. But we have got that word to deal with, and my idea is that that meant an extension. That is what he was saying: 'I am not going to ask you to take deliveries because the market has gotten soft, and we will put off to some indefinite time in the future further discussion about this contract.' I read 'abeyance' to mean an extension of time. So I don't see how you can say that the damages shall be figured in October when the quota for that month had been extended to a future indefinite time. *It seems to me that the correct theory in the case is either in January or February,* when the parties squared off to have a row over this and got their affairs in the hands of their lawyers, as you will see from the correspondence. *That is the time to take.* And you will see, as has been argued to you, that the buyer was taking the position in January which indicated that he claimed the contract had been amended and he was not going to observe it, and then you will find the same thing in February. It seems to me your choice is between those months. And that then puts

you back to a choice between the differing figures that result from the different sides as to what the market was in those months."

The appellant took exception to the Court's charge respecting this matter as follows (R. 95):

"Mr. Reynolds: The defendant objects to the direction that the jury find a verdict for the plaintiffs, and then objects to the failure of the Court to give instructions submitted.

"Further, we except to the Court's instructions on any theory of damages other than the $6,000 or the $5,100 figure based on the computation using the months of October, November, December, January, February and March for the reason that the Court has ruled that the contract was neither modified nor rescinded by the negotiations nor the letter of October 23rd, and it seems to us, therefore, that the effect of that ruling must be to give no effect to those negotiations or letter, which would put us back to the original position of the parties, so that the maximum damages must be arrived at by using the figures starting with October, either the figures used by the plaintiffs or by the defendant."

The Court denied exceptions as follows (R. 96):

"The Court: The exceptions have been considered and respectively overruled."

(4) That the District Court erred in admitting testimony of the appellee over objection of counsel for appellant, respecting a prior unrelated contract between the parties, which testimony was extremely prejudicial to the appellant.

On redirect examination of the appellee, the appellee's counsel was asking the appellee how he happened

to remember the contents of a telephone conversation between the appellee and the appellant on January 5, 1954, and the appellee answered as follows (R. 60):

> "Well, we had just finished prior to October delivering Mr. Willman 7,200 bags of corn. He had paid us a price of $9.00 during the year 1952. At that time the market price was $12.50, and we delivered to him every pound of that corn. He was buying it at $3.50 under the market price, and we saved him approximately $25,000 in the previous year. And now the minute the market dropped——
>
> Mr. Reynolds: Your Honor, just a minute——
>
> The Court: He may continue. He may tell his story.
>
> The Witness: Now that the market dropped a dollar under $9.00 he refused to take the corn."

(5) That the District Court erred in failing to grant appellant's motion for dismissal. At the close of the testimony, the appellant moved for a dismissal of the case as follows (R. 87):

> "Mr. Reynolds: That this time, your Honor, the defendant moves for a dismissal of this case on the basis that the contract itself provides certain remedies available to the seller in the event of a breach. Those remedies are set forth in the contract.
>
> "It is this paragraph: 'Buyer shall furnish seller complete shipping instructions at least ten days before the stated shipping time for each installment. If buyer fails to give seller shipping instructions as required herein then at the expiration of the stated shipping time seller may at seller's option and without notice (a) hold the goods and invoice the buyer for the same or (b) extend the time of shipment or (c) be excused from delivering the balance of the goods or continuing the performance of the contract.'
>
> "Our position is that they are limited to the

rights granted them under the contract, and in this case they do not proceed on any of those bases."

The Court, without specifically denying the motion, notified the parties that it was going to direct a verdict for the plaintiff.

SUMMARY OF ARGUMENT

The District Court erred in directing a verdict for plaintiff seller against defendant buyer on a contract for the sale of corn, to be shipped in installments, for the reason that the evidence was in dispute as to whether or not there was a reduction in price, and such was a question of fact for the jury to decide; and for the further reason that directed verdict is to be granted only when there is no substantial evidence supporting the party against whom it is directed, and there is substantial evidence that the contract price was reduced.

And if the contract was not modified or rescinded, the District Court erred in failing to instruct the jury to give consideration to mitigation of damages for the reason that the buyer was led to believe that the contract price had been reduced, and ordered out the corn at the reduced price, and the seller thus had the opportunity to sell the corn to the buyer at $1.00 per bag under the original contract price but no corn was shipped, and the Court ignored these facts, and directed the jury to find damages based on the difference between the contract price and market price at a time when the market price was considerably less than $1.00 per bag under the contract price, and, in fact, the jury found a verdict on a

market price which was $3.00 per bag less than the contract price.

That the District Court erred in failing to direct the jury to give consideration to mitigation of damages also for the reason that the contract was, at least, suspended for a period of time, and the buyer cannot be held liable for corn that was to have been shipped during that suspended period.

If the contract was neither modified, nor rescinded, then the District Court erred in failing to direct the jury to find damages based upon the difference between the contract price and the market price during the period set out in the contract, namely, October, November, December, 1953, January, February and March, 1954, and erred in instructing the jury that damages could and, in fact, should be based upon the market price in either January or February, 1954, and the jury's verdict based upon a February market price is contrary to law, for the reason that, in an installment contract, damages are based upon the time set for delivery, which was during the months of October, 1953, through March, 1954, or if that is not the basis used, then damages are based upon the time of the buyer's refusal to accept, which was no later than January, 1954.

The District Court erred in allowing testimony of the seller regarding a prior contract which was entirely irrelevant and extremely prejudicial to the buyer in that the seller, by his testimony, attempted to show that he gave the buyer a price much lower on the prior unrelated contract than the then market price, and thereby prejudiced the jury against the buyer.

That the District Court erred in failing to grant the buyer's Motion for a Dismissal on the ground that the seller, under the contract, had certain remedies for breach of contract, and that the seller was limited to those remedies by the contract and by his invoicing of the corn to the buyer, but that none of the remedies provided therein were followed by the seller in this action.

ARGUMENT

Point 1

The Court Erred in Directing a Verdict for the Plaintiff-Appellee, and Therefore, in Taking from the Jury the Question of Whether or Not the Contract Had Been Modified or Rescinded

A. Upon a Motion for a Directed Verdict for the Plaintiff, the Motion Admits the Truth of the Defendant's Evidence and of Every Inference of Fact That Can Reasonably and Legitimately Be Drawn Therefrom, and All the Evidence Must Be Interpreted in the Light Most Favorable to the Defendant.

In the case of National Molasses Co. v. Herring, 221 F. 2d 256, a buyer of molasses brought action against seller for breach of contract, wherein the issue was whether the contract between the parties was evidenced (1) by a purchase order from the buyer which permitted ordering through the month of September or (2) by a confirmation of sale sent by seller to buyer, which fixed September 1st as a cut off date for ordering shipments. The District Court directed a verdict for the plaintiff buyer, and the 8th Circuit Court reversed, holding:

> "The Trial court was evidently convinced that the plaintiff had proved conclusively that the defendant had accepted the terms of the 'purchase order,' and was, as a matter of law, liable to plaintiff for the breach of the contract. The difficulty with that conclusion is that, *in determining whether the plaintiff was entitled to a directed verdict, the District Court was required to view the evidence in the light most favorable to the defendant and most unfavorable to the plaintiff, and to give to the defendant the benefit of every inference that reasonably could be drawn in its favor.* The general rules for determining whether a trial court was justified in directing a verdict have been so fully and so frequently stated that there is no justification for repeating them. What frequently seems to be overlooked in cases such as this is that where inconsistent inferences reasonably may be drawn upon from undisputed evidentiary facts, it is for the jury, and not the court, to determine which inference shall be drawn."

In the case of Western Auto v. Sullivan 210 F 2d 36 the plaintiff seller was, as here, suing the defendant buyer for breach of contract for failure to order out glycol as agreed, and the defense of rescission or modification was raised. The defendant buyer contended that the price had been lowered by mutual agreement, based upon telephone conversations and a letter from defendant buyer to plaintiff seller. The 8th Circuit Court of Appeals held that the following charge to the jury by the District Court was correct in such case:

> "It is for you to determine whether or not there was a rescission or abandonment or modification of the original written contract. In determining this question, you may take into consideration not only all the testimony of the witnesses regarding the understanding arrived at in conversations, but also the

> conduct of the parties in the light of the surrounding circumstances, and the inference may be drawn from such conduct and circumstances that a rescission, cancellation, or modification had been agreed upon between the parties."

In Aetna Casualty Co. v. Yeatts, 122 F. 2d 350, it was held that a verdict can be directed only where there is no substantial evidence to support recovery by the party against whom verdict is directed, or where the evidenc is all against such party or so overwhelming so as to leave no room for doubt what the fact is.

The State of Oregon follows the general rule respecting directed verdicts, holding that "the party against whom the motion for a directed verdict is directed is entitled to the benefit of every reasonable inference that can be drawn from the evidence." Gresham Transfer, Inc., v. Oltman, 187 Or. 318, at 320, 210 P. 2d 927.

WHAT DOES THE EVIDENCE IN ITS MOST FAVORABLE LIGHT TO DEFENDANT SHOW AS TO A MODIFICATION OR RESCISSION OF CONTRACT?

The parties discussed lowering the contract price in October, 1953, in Chicago, because the market price of corn had dropped. The plaintiff stated that he would take it up with his partners (R. 40). The defendant confirmed this (R. 63).

Later, the parties had a telephone conversation, the exact context of which is in dispute. There is no dispute, however, that the parties did talk about a price of $8.00. The plaintiff's version of that call is as follows (R. 41):

"A. I called Mr. Willman regarding delivery of a car of corn that was left over from the previous year's contract. It was a car of corn that had sold to him for $12.50 in addition to his regular contract corn, and he asked me for a reduction in price on that particular car of corn. I gave him a $2.00 reduction because of the fact we were already in the new crop of corn and we were getting the new crop of corn cheaper. And then he asked me for a reduction on the May 11th contract from $9.00 to $8.00, which I refused to give him. However, I told him that if he wanted to buy some $8.00 open market corn we would hold up delivery on the contract corn for the time being and sell him some $8.00 open market corn."

The defendant's version of the call is this (R. 63):

"A. On October 23rd, Mr. Alver called me and he says, 'Mr. Willman, I have talked it over with my partners and' he says, 'we will'—he asked me if this would be satisfactory to me: He says, 'We will reduce the price on the one 800-bag car that we had coming from a previous contract'—that they would reduce the price from $12.50 f.o.b. Portland to $10.50 f.o.b. Portland. And he said on the May 11th contract that, for the time being, they would lower the price from $9.00 to $8.00 f.o.b. Watseka, with this provision: That if the market price went back up to $9.00 they would want then to go back to the $9.00 price. He asked me if that was agreeable and I said it was. I asked him to give me a letter in writing to that effect."

It should be noted that the foregoing was a telephone call from the seller to the buyer, following the request of the buyer, about 10 days earlier for a price reduction. The plaintiff seller did not have to make such a call.

The letter of October 23rd from the plaintiff seller to defendant buyer followed. It recites as follows (Ex. 3):

"As to the contract dated May 11, 1953, we will hold this contract in abeyance and ship you popcorn for the time being at a price of $8.00 a hundred-weight, including the bag, f.o.b. our plant."

The term "abeyance" to the plaintiff apparently meant holding up the contract indefinitely. When a contract is held up indefinitely and another price substituted, is not that obviously a new contract at the new price with a condition attached, the condition being that when the market goes up, the price goes up also? Plaintiff's cross-examination shows (R. 56):

"Q. Now, as to the length of time that you would hold up the May 11th contract, was there any specific time ever set, Mr. Alver?

A. No specific time was set. We had in mind January 1st, holding it up for three months. That had been mentioned. However, no time had been set for the holding up of the $9.00 contract.

Q. That January 1st time was not mentioned to Mr. Willman, though?

A. In our conversations it had been mentioned, I believe.

Q. Isn't it a fact that you were actually prepared to hold up that contract almost indefinitely?

A. *If the occasion had arose, I imagine we would have held it longer than that had Mr. Willman purchased his monthly requirements at the market price.*

Q. You mean at the market price or at the $8.00 price?

A. At the $8.00 price."

The term "abeyance" to the defendant meant that if the market went up, the contract price of $9.00 would be reinstated, as evidenced by his testimony, supra R. 63. And that is the logical and practical conclusion.

The term "open market corn" is used by the plaintiff seller in his testimony, presumably meaning that he would ship corn at $8.00, outside, or over and above the contract. Plaintiff even went so far as to say he used the term "open market corn" in both his telephone call and letter of October 23rd (R. 42).

It was obviously not used in the letter (Ex. 3). And the defendant testified that nothing about "open market corn" was stated in the telephone call, and that the first time it was mentioned was in the trial of this case (R. 65). The defendant also testified that the word "abeyance" was never uttered or discussed (R. 67).

In a falling market, the buyer had no need for corn outside the contract, and the seller's position now that he was willing to sell corn to the buyer in addition to what the buyer had ordered under the contract, at $8.00, is, as a practical matter, ridiculous.

The next meeting between the parties was in November, 1953, when the plaintiff came to the defendant's office in Portland. The plaintiff testified as follows of that meeting (R. 43):

> "Q. Was the May 11th, 1953, contract, Plaintiffs' Exhibit No. 1, discussed at this time in November?
> A. Yes; it was.
> Q. Do you recall what was said and by whom?
> A. Mr. Willman asked me for a price reduction in the contract. He wanted me to ship him some of the contract corn at $8.00 instead of $9.00, which I refused to do. I still said that he could buy some $8.00 open market corn if he wished. However, we insisted that he take out the 3,600 bags at $9.00 on the contract corn."

It should be noted that in the above testimony, the plaintiff said he was insisting on the defendant taking out "3600 bags," whereas, at that date the agreement was still for 7200 bags, the cancellation being made later by defendant in his letter of December 15th (Ex. 4).

The defendant's version of this November conversation is as follows (R. 65):

> "Q. During that visit did you have any conversation with him concerning the contract price under this May 11th contract?
>
> A. Yes. We talked about the amount of corn that was grown in 1953, and again we talked about changing the contract, and right along this same line the same thing was said once more, that he would change the price on the contract from $9.00 to $8.00, but again he specified this one point, that in the event the market price of corn went up he would want to go back to $9.00 price. And I told him that was very agreeable.
>
> Q. In that conversation was there any mention of the January 1st date to return to the contract price?
>
> Q. *Was there any mention of when any of the corn under the May 11th contract should be shipped?*
>
> A. *It was not discussed at that time, because on November 6th we had just unloaded the last car of the previous contract. Mr. Alver and I both knew that it takes 30 to 45 days to get rid of a car of corn, which would put us into the first of January before we would be able to order out any more corn."*

The defendant's salesman was present during the foregoing conversation and verifies the defendant's version (R. 77 and R. 79).

There follows the December 15th letter of cancellation of 6 cars of corn by the buyer (Ex. 4). It seems more than coincidental that soon thereafter, December 22nd, the seller wrote to the buyer requesting shipping instructions on 3 cars of corn for October, November and December, 1953 (Ex. 5), and enclosed an invoice for all three cars at the original contract price of $9.00.

The defendant phoned the plaintiff on receipt of that letter and asked why the $9.00 price (R. 68):

> "A. I called Mr. Alver and I asked him if he was further reducing the price of the corn 50 cents a bag. Mr. Alver says he was not. He said he was going back to the original contract price. I asked Mr. Alver why he was going back to the $9.00 price rather than the $8.00 price, and all Mr. Alver would say was that he was simply going back to the $9.00 price.
>
> Q. Was there anything said in that conversation concerning shipping instructions under the contract?
>
> A. Mr. Alver did ask us to explain our position to him, and we did put it in writing by sending through a purchase order for two cars of corn at that very same date."

The defendant subsequently sent purchase orders for all 3600 bags at the $8.00 price (Ex. 7 and 11), but the orders were ignored and no corn was shipped.

The evidence, in its most favorable light to the defendant, therefore, demonstrates that there was a lowering of the price from $9.00 to $8.00 per bag, and that the defendant complied with the new or revised agreement by ordering out all the corn at the $8.00 price.

B. Whether or Not the Contract Was Rescinded or Modified Was a Question of Fact for the Jury.

1. The General Principle Is That When There Is a Dispute as to Whether or Not a Written Contract Has Been Modified or Rescinded, It Is a Question of Fact, or, at Least, a Mixed Question of Law and Fact, for the Jury to Decide.

In H. R. Wyllie China Co. v. Vinton, 192 P. 400, 97 Or. 350 at p. 363, it is held:

> "We do not think that the court can say as a matter of law, after an inspection of the writings, that the agreement was as claimed by the plaintiff or as contended for by the defendant; but it was appropriately a question for the jury to decide what the parties intended, after viewing the writings in the light of the course of dealing followed by the parties, and in the light of the accompanying circumstances."

Cuneo Press v. Claybourn Corp., 90 F. 2d 233.
Empire Box Corp. v. Jefferson Island Salt Mining Co., 36 A. 2d 40 (Del.).
John H. Maclin Peanut Co. v. Pretlow, 11 S.E. 2d, 607 (Va).
Standard Rice Co. v. Sims, 119 S.W. 2d, 1035 (Ark).
Keeter v. Griffith, 241 P. 2d 213 (Wash.).
Krauter v. Simonin, 274 F. 791.

In Fulton v. Henrico Lumber Co., 148 S.E. 576 (Va.), it is stated:

> "While the general rule is that documents must be constructed by the Court and should not be submitted to a jury, there are exceptions to this rule. Cases frequently arise in which the parties have by parol modified their written contract, or where there are obscurities which may be clarified by parol tes-

> timony, or where the document to be construed is ambiguous and cannot be proved without proof of the attendant circumstances by parol testimony. If there be material conflicts in such admissible parol testimony, it frequently occurs that the interpretation of the documents become a mixed question of law and fact, which it is necessary to submit, as to the questions of fact, to the jury, with proper instructions."

The jury should certainly have been given the opportunity of determining just what the letter of October 23, 1953 (Ex. 3), meant in the light of the disputed evidence concerning it and the conversations of the parties, prior and subsequent thereto.

In 65 A.L.R. 649, it is stated:

> "It has been quite uniformly recognized that, where a written contract is ambiguous, and extrinsic evidence as to intention has been introduced, there does exist within the province of the jury some function as to the construction of the contract."

Justice Cardozo held, in Utica City National Bank v. Gunn, 118 N.E. 607 (N.Y.):

> "The triers of the fact must fix the sense in which the words were used in the contract."

Furthermore, "Where language of written contract is ambiguous, it must be construed most strongly against the person who prepared the document and caused the uncertainty to exist." Fischer v. Means, 198 P. 2d 389 (Cal.).

The seller, in this case, was the writer of the "abeyance" letter (Ex. 3).

2. It Was Proper and Competent for the Parties to Modify Their Contract or to Rescind the Contract and Enter into a New Agreement.

"Under the general principles of the implied rescission of contracts by the making of a new inconsistent agreement with respect to the subject matter of the old contract, it would seem on principle that entering into a new and inconsistent contract of sale with respect to the same subject matter while the old contract is unexecuted, constitutes an implied rescission of the contract." 46 Am. Jur., Sales, Section 791.

"It is entirely competent for the parties to a contract to modify or waive their rights under it and ingraft new terms upon it. The parties to a contract ordinarily are as free to change it after making it as they were to make it in the first instance, notwithstanding provisions in it designated to hamper such freedom." 12 Am. Jur. 1004, Contracts, Section 427.

3. The Statute of Frauds Does Not Preclude a Modification or Rescission in This Case.

Oregon Revised Statutes: "75.040 (1) Statute of Frauds. A contract to sell or a sale of any goods or choses in action exceeding the value of $50 shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

The District Court held and the appellee apparently contends that the letter of October 23, 1953 (Ex. 3), is not a sufficient "memorandum in writing signed by the

party to be charged." The Court stated as follows (R. 89):

> "That is where you get into legal difficulties it seems to be me, because you have to rely upon an oral modification of the contract except as you claim something for that letter with the word "abeyance" in it. That is the only writing that you can claim supports your modification theory. I just don't read that letter the way you claim for it."

The letter (Ex. 3), states "As to the contract dated May 11, 1953, we will hold the contract *in abeyance* and ship you popcorn for the time being at a price of $8.00 cwt including the bag f.o.b. our plant."

The original contract price was $9.00 a cwt (Ex. 1). The defendant's testimony (R. 63), is that the plaintiff notified the defendant by telephone prior to the above quoted letter that the plaintiff was reducing the price to $8.00, but that if the market price went up, the contract price returned to $9.00, and when the letter (Ex. 3) arrived, the defendant took no other meaning from it than that the contract price was being reduced to $8.00, subject to a rise if the market went up (R. 65). Subsequent to the letter, the plaintiff came to Portland, and, according to the defendant's testimony (R. 66), further verbally confirmed the lower price of $8.00 on the contract, and stated again that if the market price went up, the plaintiff wanted to go back to the $9.00 price. The latter is what the defendant believes the plaintiff intended by the word "abeyance."

Assuming the appellant's interpretation of the letter to be the proper interpretation, as should be done upon a motion for a directed verdict, is it not then a sufficient

writing within the Statute of Frauds, when considered in the light of the parties' conversations?

> "No particular form of language or instrument is necessary to constitute a memorandum or note in writing under the Statute of Frauds." 49 Am. Jur. Statute of Frauds, Section 321.
>
> "The memorandum required to satisfy the Statute of Frauds may be found to exist in the form of a letter." 49 Am. Jur., Statute of Frauds, Section 325.

Or, it may be determined that there was a new oral contract entered into between the parties, exclusive of the letter of October 23, 1953.

Upon this basis, the Statute of Frauds would be a bar to a counter-claim by the appellant but the oral contract is available to the appellant in this suit by way of a defense. Williston on Sales, Section 71e.

Furthermore, the seller may be estopped from setting up the Statute of Frauds. Looking at the testimony again, in its most favorable light to the buyer, the seller led the buyer to believe that there was a reduced price on the contract (R. 63, 65, 66, 67, 72).

> "He, who by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectation upon which he acted. Such a change in position is sternly forbidden." Dickerson v. Colgrove, 100 U.S. 578, 25 L. Ed. 618.

4. An Executory Contract May Be Modified Without Consideration, But Even in This Case, Consideration for a Modification Was Present.

12 Am. Jur., Contracts, Section 410, states that any executory contract which is bilateral in the advantages and obligations given and assumed may, at any time after it has been made and before a breach thereof has occurred, be changed or modified in one or more of its details by a new agreement also bilateral, by the mutual consent of the parties without any other consideration.

In case brought by a seller of poultry by carload against a buyer, it was held that "While a transaction is in fieri, or a contract is executory, the parties by mutual assent may abandon the transaction, or rescind the contract, or they may modify or alter the terms of the contract. No other consideration is necessary than the mutual assent of the parties." E. T. Gray & Sons v. Satuloff Bros., 105 So. 666 (Ala.); Penney v. Burns, 146 So. 611 (Ala.); 53 C.J. 1206, Sec. 20.

People in business know that contracts are modified as to price as a regular occurrence, particularly by a seller to a buyer, in order to retain that buyer's future business.

One case has been found on that point, and in that case it was held that, where the parties had had business dealings over a period of years, the hope of retaining the customer's good will and his future business was sufficient consideration for a material change in a sales contract. Marx v. Leichner, 121 So. 685 (La.).

And a modification of a contract by a seller agreeing to reduce price for a period on condition of return to contract price thereafter was held based upon consideration. Clayton Oil & Refining Co. v. Langford, 293 S.W. 559 (Tex.).

And in a case involving the sale of corn to be shipped at the rate of 2 cars a month, it was held that an executory contract can be modified by an agreement to pay an increased ceiling price on the corn, and the modification contains consideration, since the buyer had the right to decline further performance and let the seller sue for damages, and the buyer's relinquishment of that right in executing the modification was sufficient consideration. Ellis Gray Milling Co. v. Sheppard, 215 S.W. 2d 57 (Mo.).

Point II

The District Court Erred in Failing to Direct the Jury That It Should Give Due Consideration to Mitigation of Damages.

A. That If the Contract of May 11, 1953, Is Deemed to Have Remained in Effect, Under the Doctrine of Mitigation of Damages, Appellee Is Limited to Damages of $1.00 Per Bag, for the Reason That Appellant Submitted Purchase Orders for the Corn at $8.00, and the Appellee Refused to Recognize Such Purchase Orders.

Oregon Revised Statutes "75.640 — Action for Damages for non-acceptance of goods.

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

> "(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of the contract."

The buyer, of course, contends that he did not repudiate the contract and certainly did not wrongfully neglect or refuse to accept and pay for the goods, at least, at $8.00. The evidence shows that the seller had returned to and was holding out for the $9.00 original contract price when the buyer forwarded his purchase orders (Ex. 7, 11). Thus, the seller could have minimized the damages by selling at $8.00 and holding the buyer responsible for the difference.

It is a fundamental rule that one injured as a result of a tort or of a breach of contract is bound to exercise reasonable care and diligence to avoid loss or to minimize the resulting damage, and that, to the extent that his damages are the result of his active and unreasonable enhancement thereof, or are due to his failure to exercise such care and diligence, he cannot recover. 8 R.C.L. 442; 108 A.L.R. 1502. See also Hastings Stout Co. v. Bennett, 130 S.E. 334 (S.C.).

In a case involving the refusal of a seller to deliver lumber, except upon modified terms, in discussing the question of mitigation of damages, the court said, "We see no reason, as a matter of law, why the rule requiring the damaged party to minimize his damages as far as he reasonably can do so should exclude an obligation to buy from the party breaching the contract, if purchase can be made from him that will minimize the loss without abandoning the contract, or waiving any right

of action for damages for a breach growing out of it" Borden & Co. v. Vinegar Bend Lumber Co., 2 Ala. App. 354, 56 So. 775, and reiterated in the same case in 7 Ala. App. 336.

It has also been held that if, after a breach by the buyer, by his wrongful refusal to accept, the seller resells to him for a less price, this is not a rescission of the old contract so as to defeat the seller's right to recover, as damages for the wrongful refusal to accept, the difference between the original price and the price paid on the resale; in such a case, it has been held immaterial that no notice was given by the seller to the buyer of his intention to hold the buyer for the difference. 46 Am. Jur., Sales, Section 791 at p. 919; Arkansas & T. Grain Co. v. Young, 96 S. W. 142 (Ark.); E. T. Gray & Sons v. Satuloff Bros., 105 So. 666 (Ala.).

B. If the Contract of May 11, 1953, Is Deemed to Have Remained in Effect, and the Contract Was Held in Abeyance by Appellee's Letter of October 23, 1953, During the Months of October, November and December, 1953, Then the Contract Became One for 1800 Bags, or 3 Cars Only, and Damages Must Therefore Be Based Upon a Contract for 1800 Bags.

The appellee, by his own interpretation of the letter of October 23, 1953, states that the letter meant that shipments under the contract would be indefinitely suspended (R. 56).

"Abeyance" means "Temporarily inactive, suspended, or suppressed; temporarily without manifest existence." Webster's New International Dictionary, 2d Edition.

In other words, the contract was without manifest existence during the period of its abeyance, and the obligation of the appellant to purchase corn under the contract from the appellee during October, November and December, 1953, ceased.

Unless this meaning is given to the letter of October 23, 1953, it has no meaning whatsoever, except as a rescission or modification of the contract.

In the case of J. C. Engelman v. Sanders Nursery, 140 S.W. 2d 500 (Tex.), in which the contract was modified to provide for shipments at a later indefinite date, it was held there was no longer a contract at all: "On an indefinite contract neither liquidated damages nor the damages contemplated by law resulting from a breach can be recovered,—in short, there is no contract to be breached."

Point III

The District Court Erred in Failing to Direct the Jury to Find the Damages Based Upon the Market Price at the Time and Place of Delivery, or at Any Appropriate Time, and the Jury's Verdict Is Contrary to Law

If it is found, as the District Court held, that the original contract (Ex. 1), had neither been rescinded nor modified, and, if no consideration is to be given to the "abeyance" letter, at least as a suspension of the contract, for at least 3 months, then the parties are placed in their original position, with a contract for 6 cars of corn, one car to be shipped each month, begin-

ning in October, 1953, and ending in March, 1954, and damages should have been computed upon the difference between the market price and the contract price, at the time and place of delivery, i.e., the sum total of the difference on each car for each of these months. Both the buyer and seller were qualified to testify as to the market price and their testimony was as shown below:

	Contract Price	Buyer's Market Estimate (R. 73)	Seller's Market Estimate (R. 52)	Buyer's Diff.	Seller's Diff.
Oct. '53	$9.00	$9.00	$8.00	none	$1.00
Nov. '53	9.00	8.00	8.00	1.00	1.00
Dec. '53	9.00	7.00	7.00	2.00	2.00
Jan. '54	9.00	7.25	6.50	1.75	2.50
Feb. '54	9.00	6.75	6.00	2.25	3.00
March '54	9.00	6.00	6.00	3.00	3.00

Upon the foregoing, it can be seen that the damages, when based upon the sum total of the difference between market price and contract price during the months of October, 1953, through March, 1954, would be as follows:

	Based on Buyer's Figures		Based on Seller's Figures	
Oct.	600 bags x none	no damage	600 bags x $1.00	$ 600.00
Nov.	600 bags x $1.00	$ 600.00	600 bags x 1.00	600.00
Dec.	600 bags x 2.00	1200.00	600 bags x 2.00	1200.00
Jan.	600 bags x 1.75	1050.00	600 bags x 2.50	1500.00
Feb.	600 bags x 2.25	1350.00	600 bags x 3.00	1800.00
Mar.	600 bags x 3.00	1800.00	600 bags x 3.00	1800.00
	Total	$6000.00	Total	$7500.00

The seller considered the contract to be in effect from October on, because his letter and invoice (Ex. 5), of December 22, 1953, definitely show that he was holding the buyer to the original shipping dates. In that letter the seller demanded that the buyer give shipping instructions for the October, November and December ship-

ments at the original contract price of $9.00. And on January 5, 1954, the seller was still insisting on the original shipments (R. 56).

The measure of damages when the buyer breaches a contract of sale for delivery in installments is computed upon the difference between the market price and contract price at the time and place of delivery of each installment.

44 A.L.R. 229; 108 A.L.R. 1488.
Scruggs v. Riddle, 171 Ala. 350, 54 So. 641.
Newton v. Bayless Fruit Co., 155 Ky. 440, 159 S.W. 968.
Gentile Bros. Co. v. Rose, 7 F. 2d 879, 6th Circ.
Simons v. Ypsilanti Paper Co., 77 Mich. 185, 43 N.W. 864.
Smith & Co. v. Russek, 212 F. 2d 338 (5th Circ.).

In California Sugar & White Pine Co. v. Whitmer Jackson & Co., 263 P. 504 (N.M.), the court approved an instruction directing the jury that, inasmuch as the goods were to be delivered in installments they should find the market value of each installment, the difference between that sum and the contract price being the damages on that installment, and that the total damages would be the sum of the damages on all the installments.

In any event, the Court erred in instructing the jury that it could determine all the damages, as of the marbet price in February, 1954, and the jury's verdict is contrary to law, because the verdict is apparently based upon a February market price.

Oregon Revised Statutes—"75.640. Action for damages for nonacceptance of goods. (1) Where the buyer wrongfully neglects or refuses to accept and

pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

Thus, if the time or times for acceptance is not used as a basis for computation or damages, or if no time for acceptance is established, then the damages are determined as of the time of refusal to accept. Engraw v. Schenley Distilleries, 181 F. 2d 876.

The refusal of the buyer to accept the corn, according to the seller's own testimony, occurred no later than January 5, 1954, when the buyer told the seller he would buy no corn at $9.00 (R. 46), and may be deemed to have occurred during either October, November or December, 1953, when the buyer did not order out corn for those months. It appears that the seller considered the contract breached in December, when he wrote his letter (Ex. 5), demanding shipping instructions.

The seller cannot, after receiving notice of cancellation of sale by the buyer, by urging the latter to reconsider his refusal to accept the goods, hold the latter liable for a subsequent fall in the market price of the goods.

Franklin Sugar Refining Co. v. Lykens Mercantile Co., 117 A. 780 (Pa.).

In La Grange Grocery Co. v. Lamborn, 283 Fed. 869, the measure of damages was held to be the difference between the contract price and the highest market price on the day when the seller notified the buyer that, unless shipping directions were given within a certain length of time, the seller would regard the contract as breached, the buyer having failed to give shipping instructions.

Point IV

The District Court Erred in Admitting Testimony of the Seller Over Objection of Counsel for Buyer, Respecting a Prior Unrelated Contract Between the Parties, Which Testimony Was Extremely Prejuicial to the Buyer

On redirect examination of the appellee, the appellee's counsel was asking the appellee how he happened to remember the contents of a telephone conversation between the appellee and the appellant on January 5, 1954, and the appellee answered as follows (R. 60):

> "Well, we had just finished prior to October delivering Mr. Willman 7,200 bags of corn. He had paid us a price of $9.00 during the year 1952. At that time the market price was $12.50, and we delivered to him every pound of that corn. He was buying it at $3.50 under the market price, and we saved him approximately $25,000 in the previous year. And now the minute the market dropped—
>
> "Mr. Reynolds: Your Honor, just a minute—
>
> "The Court: He may continue. He may tell his story.

"The Witness: Now that the market dropped a dollar under $9.00 he refused to take the corn."

The seller was obviously making a determined effort by his testimony to prejudice the jury against the buyer, by claiming that in the previous year the buyer had had a contract which was under the market price. That may or may not have been true, but it had no bearing of any kind on the case at issue. The Court should have stricken the testimony and instructed the jury to disregard it, but instead of that, the Court encouraged the seller to "tell his story." (R. 60)

Such testimony encouraged by the court to be told was no doubt one of the prime factors in the jury's determination of damages.

"The trial court may and should exclude immaterial, irrelevant and incompetent evidence which tends to confuse and mislead the jurors by diverting their attention from the real issue—Evidence which serves only to prejudice the minds of the jury is properly excluded."

53 Am. Jur., Trial, Sec. 98.
3 Am. Jur., Appeal & Error, Sec. 1029.

Point V

That the District Court Erred in Failing to Grant Appellant's Motion for Dismissal

The Contract (Ex. 1), provided in part as follows:

"If Buyer Fails to give Seller shipping instructions as required herein then at the expiration of the stated shipping time Seller may at Seller's option and without notice (a) hold the goods and invoice the Buyer for same or (b) extend the time

> of shipment or (c) be excused from delivering the balance of the goods or continuing the performance of the contract.

The above contract set forth the rights of the seller in event of default, and while the remedies provided are not specifically made exclusive, that is certainly the fair interpretation of the language, particularly since the last clause of the contract (Ex. 1), states that the contract expresses the entire agreement of the parties. And doubt must be resolved against the seller, since the contract is on his printed form.

That the seller considered his remedies to be as provided in the contract and not under the general law of sales is readily apparent. When he decided to enforce the contract he invoiced three cars (Ex. 5, R. 10), which he was entitled to do under (a) above, but not under the Sales Act. And once he exercised his option to so proceed as to part of the contract, he was bound to continue in the same manner as to the balance. See 46 Am. Jur. 674, Sales, Sec. 515, which gives the law as follows:

> "When the contract of sale is broken, the seller, having the choice of remedies, is put to an election, and having made one, and having dealt with a portion of the property left in his possession in accordance with that remedy, he must pursue the same remedy as to the whole * * *."

The parties may by agreement vary the law that would otherwise apply. Oregon Revised Statutes, Sec. 75.710, which is similar to Sec. 71 of the Uniform Sales Act, provides:

> "Variation of implied obligations. Where any right, duty or liability would arise under a contract

> to sell or a sale by implication of law, it may be negatived or varied by express agreement or by a course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

In Christian Mills v. Berthold Stern Flour Co., 247 Ill., App. 1, the seller brought suit for damages computed according to the terms of the contract. The buyer claimed that damages should be based on usual rules of law. The contract provided: "On breach of contract by buyer, liquidated damages shall be recoverable by seller as follows: * * *." The Court at p. 13 stated: "* * * The formula which pertained to the measurement of the seller's damages should have been recognized in the trial of the case as lawful and properly binding upon both parties * * *"

In Permutit Co. v. Massasoit Mfg. Co., 61 F. 2d 529, the contract set forth some warranties but did not negative others. At p. 530 there is this language: "The authorities overwhelmingly established the doctrine that, where the parties have set out in the written contract the warranties agreed upon and have provided for a remedy in case of a breach of warranty, the remedy thus provided is exclusive."

Certainly the above theory should apply equally to a breach of any other kind. Here the contract provided for three remedies, and those should be held to be exclusive.

The complaint was based on a remedy not provided for in the contract, hence the buyer's motion to dismiss should have been allowed.

CONCLUSION

For the reasons stated herein it is submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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